

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

In the matter of the amendment )	NOTICE OF AMENDMENT
of ARM 17.30.502, 17.30.615, )	
17.30.619, 17.30.651, )	(WATER QUALITY)
17.30.653, 17.30.656, )	
17.30.657, 17.30.702, )	
17.30.715, 17.30.1001, )	
17.30.1006, and 17.30.1007 )	
pertaining to water use )	
classifications and department )	
Circular WQB-7 )	

TO: All Concerned Persons

1. On December 24, 2003, the Board of Environmental Review published MAR Notice No. 17-203 regarding a notice of public hearing on the proposed amendment of the above-stated rules at page 2808, 2003 Montana Administrative Register, issue number 24.

2. The Board amended the rules exactly as proposed.

3. The following comments were received and appear with the Board's responses:

Comment No. 1: The proposed amendments to the D-2 classification standards are much more restrictive than the existing D-2 classification. The Board should not adopt the amendments because the existing classification sufficiently protects water quality in low flow ditches.

Response: The Board acknowledges that the proposed amendments to the D-2 classification standards are more stringent than those previously adopted one year ago. The new D-2 classification and standards, however, are identical to the classification and standards adopted one year ago in one important aspect. The standards under either the existing or amended D-2 classification will only apply to a specific water body after a Use Attainability Analysis (UAA) has been performed and the U.S. Environmental Protection Agency (EPA) has approved the water body's re-classification. See ARM 17.30.615(2). Prior to a UAA and EPA's approval, all state waters, including those in ditches, are currently classified under one of the water use classifications designated A-1 through C-3 in ARM 17.30.607 through ARM 17.30.614. The standards for those classifications are considerably more stringent than those under the D-2 classification adopted one year ago. Since no water body has been re-classified under the existing D-2 classification, the more stringent standards found in ARM 17.30.607 through 17.30.614 still apply to state waters that flow through ditches.

Moreover, even though the amended standards in D-2 are more stringent than those adopted a year ago, the amendments

explicitly allow the standards for non-priority pollutants to be modified or removed from the new D-2 classification based upon the performance of a UAA. Under EPA's requirements implementing the federal Clean Water Act, the performance of a UAA is necessary whenever a designated use of a water body is removed. The requirement for a UAA applies to the existing and amended version of the D-2 classification because both versions eliminate certain designated uses that would otherwise apply under ARM 17.30.607 through 17.30.614.

Comment No. 2: Implementation of the proposed amendments could have unintended consequences to the aquatic life present in a ditch that is re-classified as D-2. For example, a company may decide to eliminate its discharge due to the cost of treatment to meet the new standards. Eliminating or removing the discharge would reduce the flow of water in the ditch to the point where aquatic life is harmed or could no longer survive.

Response: As explained in response to Comment No. 1, the standards that are currently in effect for all state waters, including state waters in ditches, are more stringent than those proposed by the Board with these amendments. For this reason, the unintended consequences referred to above could just as easily occur today due to the existing, more stringent standards adopted under ARM 17.30.607 through 17.30.614.

During the process of re-classifying a water in the D-2 classification, the environmental benefit of a discharge to a low flow stream or ditch, as well as the costs associated with treating water to meet the standards under the D-2 classification, may be addressed in a UAA. A finding of net environmental benefit from the discharge, when compared to the cost of treatment and possible elimination of effluent to avoid those costs, may warrant the modification or elimination of certain water quality standards in low flow streams or ditches.

Comment No. 3: The Board should not adopt the proposed amendments given the unintended consequences of harming aquatic life by encouraging dischargers to remove their discharge to another location.

Response: Under the authority of the CWA, EPA disapproved the water quality standards previously adopted by the Board for the D-2 classification. In its disapproval letter, EPA identified specific concerns that must be addressed and recommended changes that would meet those concerns. If not addressed, the CWA requires EPA to promulgate water quality standards for the State. Accordingly, the Board is adopting the proposed amendments since those amendments are necessary to meet the requirements of the CWA.

Comment 4: A commentator recommended that the Board adopt regulatory language that gave the Department discretion to adjust water quality standards for low flow streams and

ditches that receive a discharge "if the application of more stringent water quality standards will have negative or little benefit to the environment."

Response: The request to initiate rulemaking is outside the scope of this rulemaking and is not necessary. The proposed amendments to the D-2 classification give the Board authority to modify or remove specific water quality standards based on the findings of a Use Attainability Analysis.

Reviewed by:

BOARD OF ENVIRONMENTAL REVIEW

_____	By:	_____
JOHN F NORTH		JOSEPH W. RUSSELL, M.P.H.
Rule Reviewer		Chairman

Certified to the Secretary of State, \_\_\_\_\_, 2004.